BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption Concerning the Refund of Payphone Line Rate Charges	Case No. CC Docket No. 96-128 REPLY COMMENTS OF NPCC AND MIPA IN SUPPORT OF PETITION OF FPTA FOR DECLARATORY RULING

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I. INTRODUCTION

The Northwest Public Communications Council ("NPCC") and the Minnesota Independent Payphone Association ("MIPA") file this reply to the Comments of AT&T, BellSouth and Verizon ("Opponents") opposing the relief sought by the Florida Public Telecommunications Association ("FPTA"). First, the Opponents incorrectly contend that this Commission is bound by the Florida Public Service Commission's ("Florida PSC") interpretation of the Commission's own payphone orders in Docket 96-128 ("Payphone Orders") implementing Section 276 of the Telecommunications Act. There is no legal basis for this far-fetched claim. The Telecommunications Act mandates that this Commission's directives concerning Section 276 automatically preempt the contrary rulings of any state commission, including the Florida PSC. 47 U.S.C. § 276(c). Thus, any inconsistent state orders are void upon inception and are entitled to no deference from this Commission at any time. Id.

Second, the Opponents mistakenly allege that Florida law regarding the filed rate doctrine and retroactive ratemaking prevent this Commission from correcting the erroneous application of the new services test ("NST") by the Florida PSC. To the contrary, the Commission's federal preemption mandate under Section 276(c) of the Telecommunications Act sweeps away these state law doctrines. Even if the filed rate doctrine were applicable (which it is not the case), all RBOCs, including BellSouth, waived it in 1997.

Third, the Opponents claim that BellSouth did not rely on the waiver extended by the Commission's 1997 Refund Order and thus are not subject to the refunds it mandates. See 12 FCC Rcd. 21370 (1997)("Refund Order"). This is false. BellSouth, like other RBOCs, expressly requested the waiver granted in the Refund Order from the Commission in 1997, so that BellSouth could begin collecting dial-around compensation even though its payphone line rates greatly exceeded the levels permitted under the New Services Test ("NST"). BellSouth then relied on the waiver once it began collecting dial-around compensation. It would have been illegal to do so without the waiver.

Fourth, the Opponents overlook the fact that payphone service providers ("PSP") would be entitled to repayment of overcharges by RBOCs, even absent the Commission's Refund Order. The RBOCs discriminated against other PSPs by charging amounts in excess of the rates permitted under the new services test ("NST"), in violation of Section 276. Sections 206 and 207 of the Communications Act allow PSPs to recover damages for the amounts of those discriminatory overcharges. The Commission cannot allow the Florida PSC's ruling on refunds to restrict the rights of PSPs who were damaged by a BOC's violation of Section 276(a) to recompense of those damages.

In the end, this Commission cannot allow states to splinter federal telecommunications law by implementing Section 276 inconsistently from the Commission's orders. The Commission should accordingly grant the FPTA's petition. In doing so, the Commission should emphasize that Section 276 and this Commission's orders preempt any contrary state commission orders--not just orders of the Florida Public Service Commission ("FPSC"). Moreover, the Commission should emphasize that all RBOCs--not just BellSouth--must refund to payphone service providers ("PSPs") the charges that the RBOCs collected in excess of the allowable rate under the New Services Test ("NST").

II. ARGUMENT

A. THIS COMMISSION'S ORDERS PREEMPT INCONSISTENT ORDERS OF THE FLORIDA PSC

The Opponents posit that the Commission is bound by the Florida PSC's 1998 order holding that BellSouth's payphone rates met the NST requirements, regardless of whether the Florida PSC erroneously applied Section 276(a) and the Commission's orders. Opponents at 13. This argument would give state law supremacy over federal law. To the contrary, this Commission's regulations preempt all inconsistent orders of any state commission, including the Florida PSC:

> To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

47 U.S.C. § 276(c). See also U.S. Const. Art 6., cl. 2. The broad federal preemption under 276(c) is automatic, non-optional and unqualified. The Florida PSC's 1998 Order (and any other state commission order) is void to the extent it does not comply with the Commission's payphone orders in Docket 96-128 ("Payphone Orders"), and this Commission must so hold at any time the issue comes before it.

In fact, the Commission cannot allow the Florida PSC's erroneous order to stand, because the Commission has the duty to correct misguided interpretations of its Payphone Orders by any state commission. The Telecommunications Act requires this Commission to "take all actions necessary" to prescribe regulations that implement Section 276, including the requirement that the RBOCs must have in place "nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623 proceeding," which safeguards include the NST. The Commission can only meet this duty by ensuring that its Payphone Orders are correctly enforced. The Commission cannot ignore the Florida PSC's incorrect application of the NST, such as its failure to analyze BellSouth's overhead cost data and its failure to order BellSouth to pay refunds for NST overcharges pursuant to the Refund Order.

The Commission's Payphone Orders also preempt contrary Florida PSC orders based on the Supremacy Clause of the United States Constitution. U.S. Const Art. 6, cl. 2. Under the Supremacy Clause, "[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law." *Louisiana Public Service Com. v. FCC*, 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369, 381-82 (1986); *AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 378 n.6, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999). Congress intended for federal law regarding Section 276 to preempt contrary state law, since the purpose of Section 276 was to eliminate discrimination and promote competition among payphone services providers nationwide. See 47 U.S.C. § 276(a), (b)(1).

In effect, the Opponent urge this Commission to allow a state commission to establish a separate interpretation of federal law, applicable only in that state, that is immune from federal review. This makes no sense and violates the plain meaning of Section 276. The

Opponents cite no relevant authority that would allow state proceedings to overcome an express congressional mandate.

B. THE FILED RATE DOCTRINE AND RETROACTIVE RATEMAKING DOCTRINE DO NOT PROHIBIT THE COMMISSION FROM ENFORCING ITS ORDERS.

The Opponents allege that the filed rate doctrine and prohibitions against retroactive ratemaking prohibit the Commission from reviewing the Florida PSC order approving BellSouth's rates and denying refunds. Opponents at 13, 14. To the contrary, Section 276(c) of the federal Telecommunications Act preempts "any state requirements"—such as the state-law-based filed rate and retroactive rulemaking doctrines—that are inconsistent with the Commission's regulations under Section 276. Moreover, BellSouth, like other RBOCs, waived the filed rate doctrine defense in 1997; application of the doctrine would thwart its purpose; and the doctrine does not apply to competitors like BellSouth and the FPTA members.

a. The Telecommunications Act preempts Florida law concerning the filed rate doctrine and retroactive rulemaking

The Commission's orders and the Telecommunications Act expressly preempt the filed rate doctrine and prohibitions against retroactive ratemaking in this case. Because the Commission's orders and the Telecommunications Act are federal law, and the filed rate doctrine and prohibitions against retroactive ratemaking are state law, the state doctrines must yield. Courts widely recognize the intuitive principle that tariffs have the force and effect of state or federal law, depending on where they are filed.[1] Where a federal agency regulates the rates, the filed rate doctrine arises under federal law.[2] The federal filed rate doctrine only applies to a "rate that a federal agency has reviewed and filed." *County of Stanislaus v. Pacific Gas & El.*

[1] *See Arizona Grocery v. Atchison, T. & S. F. Ry Co.,* 284 U.S. 370, 390, 52 S. Ct. 183, 186 (1932); *General Telephone Co. v. City of Bothell,* 716 P.2d 879, 105 Wn.2d 579 (1986).

[2] *See, e.g., Keogh v. Chicago & Northwestern Railway Co.,* 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922); *Maislin Industries, U.S. v. Primary Steel, Inc.,* 497 U.S. 116, 128-129, 110 S. Ct. 2759, 2767 (1990); *AT&T v. Central Office Tel. Inc.*, 524 U.S. 214, 221-222 (1998).

Co., 114 F.3d 858, 866 (9th Cir. 1997). When a state agency regulates the rates, the filed rate has the effect of state law.[3]

As noted above, Section 276(c) and the Supremacy Clause mandate that applicable federal law preempts state law in these circumstances. State-filed tariffs are subject to Federal preemption, like any state law. *AT&T*, 525 U.S. at 378. Here, BellSouth filed the rates at issue with the Florida PSC, a state commission. The only filed rate and retroactive ratemaking doctrines that could be relevant are those arising under Florida law. Since federal law trumps state law under Section 276, the Commission's interpretations of its own orders trump any Florida PSC orders approving BellSouth's rates, regardless of the Florida filed rate and retroactive ratemaking doctrines.

This result comports with common sense. If a state commission could use the filed rate doctrine to shield Commission review of its orders approving rates, then every state commission would be free to establish a unique interpretation of federal telecommunications law, independent from how that law is applied by the Commission or other states. No state commission would need defer to applicable FCC orders because the state commission's orders would be beyond the Commission's review. This would make it impossible to implement federal telecommunications policy on a consistent and comprehensive basis.

b. BellSouth waived the filed rate doctrine defense in 1997.

Notwithstanding its arguments to the contrary, BellSouth at a minimum waived its right to claim protection under the filed rate doctrine when it requested a waiver of the Commission's rules implementing Section 276 in 1997. Even though the filed rate doctrine is preempted here, for the sake of argument NPCC and MIPA analyze BellSouth's waiver.

On April 10, 1997, BellSouth, as part of the "RBOC Coalition," asked the Commission to grant a waiver of the requirement to have payphone tariffs in effect that comply with the NST. Refund Order at ¶ 13. BellSouth requested a waiver of 45 days to May 19, 1997, to permit it to file NST-compliant PAL rates with the states. Refund Order at ¶ 13. Without a

[3] *See, e.g., General Telephone*, 716 P.2d 879.

waiver, BellSouth was at risk of losing many millions of dollars of dial around compensation ("DAC").

BellSouth's letter requesting this waiver offered a quid pro quo to the Commission. In that letter, BellSouth (as a member of the RBOC Coalition) "voluntarily 'committ[ed]' to reimburse or provide credit to those purchasing the services back to April 15, 1997 . . . 'to the extent that the new tariff rates are lower than the existing ones'" if the FCC would grant it an extension of time to file NST-compliant tariffs. Refund Order at ¶ 16. As part of that commitment, the RBOCs expressly waived the filed rate doctrine:

> [T]he filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we [the RBOCs] can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.

Letter from Michael Kellogg, RBOC Coalition Counsel, to Mary Beth Richards, FCC (April 10, 1997)(emphasis added). Accordingly, BellSouth's own words rebut its claim to have not waived the filed rate doctrine, which in any event is preempted and irrelevant here.

c. Applying the filed rate doctrine as BellSouth urges would pervert its very purpose.

Courts have consistently limited the scope of the filed tariff doctrine to enforcing the non-discrimination principle. *E.g.*, *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922)(holding that "the rate is made for all purposes the legal rate between carrier and shipper . . . to ensure uniformity of rates between customers."); *City of Lockwood v. Union Electric Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982) (same). Since *Keogh*, the filed-rate doctrine has been "vigorously criticized." *Cost Management Services v. Washington Nat. Gas Co.*, 99 F.3d 1402 (9th Cir. 1995). Both judicial and academic considerations of the doctrine have undermined its continuing validity. *See* 1A P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 247(b) (2nd Ed., 2000).

In 1986, the U.S. Supreme Court narrowed the filed-rate doctrine's applicability by holding that *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to and approved by the ICC was the product

of an antitrust violation. *Square D Co. v Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986). Thus, the filed-rate doctrine should be narrowly construed and applied because the arguments for the doctrine never "had much to be said for them at the time they were originally made and they are even less sensible today." *Cost Management*, 99 F.3d at 914 (quoting Professors Areeda and Hovencamp).

Despite Congress' mandate in Section 276(a) and this admonition to construe the filed-rate doctrine narrowly, the Oponents seek to apply it in a wholly novel and unprecedented manner –allowing tariffs filed with a ***state*** agency to pre-empt a ***Federal*** agency's order. The Supremacy Clause (and Congress' intention in the 1996 Act) compels the exact opposite result. Congress' explicit command was that the RBOCs cease discriminating against competing PSPs on April 15, 1997. *See* 47 U.S.C. § 276(a)(2). To uphold Bell South's reliance on the filed rate doctrine would be to sanction the very discrimination the doctrine is intented to prevent, plus thwart Congress' directive to end discrimination.

The FCC must not allow a doctrine that was developed to prevent discrimination to instead protect discrimination and shelter the violator from claims for redress.

d. <u>The filed rate doctrine does not apply to competitors like BellSouth and the FPTA members</u>.

The filed rate doctrine would not be relevant even if it were not preempted and waived, since the filed rate doctrine does not apply to competitors. *Cost Management*, 99 F.3d at 946*; see also Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1121 (3rd Cir. 1979); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982), *cert. denied* 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2nd Cir. 1981) (all adopting competitor exception to filed rate doctrine). The decisions are consistent with the original purpose of the doctrine, which is to prevent descrimination among end user customers, not to allow unlawful, discriminatory, and anticompetitive conduct to be immune from redress.

C. BELLSOUTH, LIKE ALL THE RBOCS, RELIED ON THE REFUND ORDER AND IS SUBJECT TO ITS REFUND MANDATE

BellSouth contends that it never relied on the waiver it received in the Refund Order because it did not file new, NST-compliant tariffs promptly after the Order issued. Opponents at 16. Contrary to BellSouth's claims, the Refund Order did not say that an RBOC would only be deemed to have taken advantage of the waiver if it met its obligation to file new NST-compliant rates.[4] Rather, it allowed BellSouth and other RBOCs to begin collecting DAC on April 15, 1997, even if they had not complied with their obligation to reduce payphone access service rates to non-discriminatory levels consistent with the NST. Thus, BellSouth, like the other RBOCs, relied on the waiver as soon as it began to collect dial around compensation ("DAC") in 1997. BellSouth could not legally collect DAC absent the waiver, because its payphone tariffs did not comply with the NST. BellSouth relied on the waiver to collect DAC until it exited the payphone business. The fact that the Florida PSC in 1998 (after BellSouth began collecting DAC) held that BellSouth's payphone rates met the NST is irrelevant, because the Florida PSC's order did not follow federal law and was preempted, as explained above.

It is of course ridiculous for BellSouth or any RBOC to contend that it sought the waiver granted in the Refund Order yet never took advantage of it. The truth is that the RBOCs entered a quid pro quo with the Commission but never honored their end of the deal, which was to issue refunds when they finally filed NST-compliant rates. Instead of complying with the NST, BellSouth and the other RBOCs fought the Commission's authority to implement the NST. The RBOCs ultimately lost that battle in 2003. *See New England Public Comm. v. FCC*, 334 F.3d 69, 72-74 (D.C. Cir. 2003)(explaining the tortured history of those challenges); *see Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701 *(2002).*

[4] Under BellSouth's argument, an RBOC that filed new rates promptly, by May 19, 1997, would be subject to refunds, while an RBOC that delayed any effort to comply with the NST for years would be immune from refund claims.

The only way the RBOCs will honor their end of the quid pro quo is if this Commission forces them to do so. The Florida PSC did not do it, and other state commissions are divided on the issue. Now is the time for the Commission to enforce its own orders.

D. PAYPHONE PROVIDERS ARE ENTITLED TO RECOVERY OF OVERCHARGES UNDER SECTION 206 AND 207 OF THE TELECOMMUNICATIONS ACT

BellSouth overlooks the fact that the PSPs would be entitled to a refund even if the Refund Order did not exist, due to the fact that BellSouth's failure to comply with the NST was discriminatory. Section 276(a) states that "any Bell operating company that provides payphone service . . . shall not prefer or discriminate in favor of its payphone service." 47 U.S.C. § 276(a). To prevent BOC rate discrimination, Congress directed the FCC to implement Section 276(a) by applying the NST safeguards to BOC payphone rates. 47 U.S.C. § 276(b)(1)(c).

BellSouth, like many other RBOCs, continued to discriminate against PSPs by charging them rates for payphone services in excess of the rates allowed under the NST, while simultaneously imputing a lower, cost-based rate to their own payphone operations. Because PSPs must connect to the RBOC's network to compete with them in the payphone business, RBOCs were able to provide their own payphone business with cost-based network services for years while at the same time refusing to provide cost-based service to the PSPs. BellSouth's refusal to do this in Florida until 2004 gave it a competitive advantage for the entire time it chose to be a provider of payphone services.

Under Section 206 of the Communications Act, PSPs are entitled to collect damages for the RBOCs' failure to comply with the NST because, *a fortiori*, that failure was also a failure to comply with Section 276(a). Section 206 states that carriers are liable for damages they cause by violating Section 276 and for the damaged party's attorney's fees:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, <u>such common carrier shall be liable to the person or person injured thereby for the full amount of damages</u> sustained in consequence of any such violation of the provisions of

> this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 206 (emphasis added). Section 207 entitles parties to seek damages under Section 206 either before the Commission or before a U.S. District Court. 47 U.S.C. § 207.

The measure of the damages due to PSPs under Section 206 would be the difference between NST-compliant rate and the non-compliant rate charged for many years. This is the same amount due under the Refund Order. Either way, there is no basis for the Commission to snuff out the legitimate claims of the PSPs for the benefit of the RBOCs, who have long profited from their illegally-high rates.

III. CONCLUSION

The NPCC and MIPA support the FPTA Petition and all the Petitions. Whether they are granted in whole or in part, however, the Commission should act promptly to provide guidance for the other states and courts that are faced with deciding similar issues. Prompt Commission action will help ensure consistent application of the Commission's orders and proper implementation of the non-discrimination requirements of Section 276(a).

DATED this 10th day of March, 2006.

Respectfully submitted,

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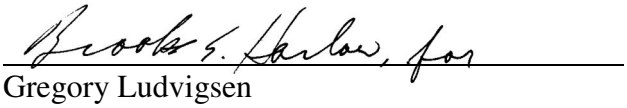

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Dated this 10th day of March, 2006.

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